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## RESTORING THE BALANCING TEST: A BETTER APPROACH TO FAIR USE IN COPYRIGHT

CHARLIE PENROD, J.D.<sup>1</sup>

### *ABSTRACT*

Fair use analyses are overly vague and abstract. While the Copyright Act established four factors for courts to consider when determining if an alleged infringer's use of copyrighted work is "fair", these factors are not susceptible to easy interpretation. More importantly, once these factors have been interpreted, a trier of fact is instructed to balance these factors against each other. No effective method currently exists in guiding courts as to how to balance inherently disparate factors against each other, either in terms of intensity of the factors or how one factor might balance against another totally different factor. This article proposes a framework that would allow courts to interpret each of the four factors and then assign a grade of 1-4 for each factor. After each factor is graded, the values are inserted into the framework, which then performs the balancing and reaches a conclusion on fair use. Having an objective basis for reaching a fair use determination helps to eliminate result-oriented decisions and provides a firm ground of support for a court's decision.

1. Assistant Professor, University of West Florida. I would like to thank Mathew Morrison for his enormously valuable feedback on an earlier draft of this Article.

## RESTORING THE BALANCING TEST: A BETTER APPROACH TO FAIR USE IN COPYRIGHT

CHARLIE PENROD, J.D.

### INTRODUCTION

Little Johnny and Jimmy are brothers. Johnny is five years old and Jimmy is three. Johnny and Jimmy are playing with their trucks on the living room floor. Jimmy decides that he no longer likes the truck he has and reaches over to take Johnny's truck. Johnny quickly puts it out of reach and tells Jimmy, "It's mine – you can't have it!" Jimmy looks to his mother and begins to cry uncontrollably and says, "But Mom – I want it!" Mom looks at Johnny and says, "Look Johnny – you are bigger and you can play with something else. He is too small to understand that some things belong to others. Just give him your truck and go find something else to do." Johnny hesitantly gives the truck to Jimmy before pitifully saying, "This isn't fair!"

Maybe it is fair and maybe it is not. Who can tell? Mom has decided what is fair subjectively without any real objective standard. Perhaps she was simply tired of hearing little Jimmy cry. Perhaps she felt that Johnny should not be bothered by losing the truck to Jimmy. Maybe she thinks that Johnny simply should not have complete ownership over the truck, and he should be willing to share with those who do not have what he has. Either way, Johnny is left wondering why life and Mom have treated him unfairly, while Jimmy gets to gleefully play with something that is not rightfully his.

The same dilemma strikes judges and juries when deciding whether or not a second person can appropriate someone else's copyrighted property as their own. Just like Mom really had no bright line basis to determine what was "fair", neither do triers of fact.<sup>2</sup> And, that is a problem. The law allows others to take copyrighted original works only if the use is a "fair" one.<sup>3</sup> Sometimes, society is better off by allowing others to use copyrighted works as their own, just as Mom believed her family's life would be better off by allowing Jimmy to have the truck. But, without some justification for why some uses are fair and some are not, litigants could be left with the sense that the decision was simply an arbitrary decision against them. Copyright law, and Mom's decision making, would be much better off if some

2. A determination of fair use uses a statutory balancing test rather than a bright line rule. *See* 17 U.S.C. § 107 (2012); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

3. 17 U.S.C. § 107 (2012).

framework existed to more objectively determine what is and what is not fair.

This Article seeks to provide triers of fact with a new framework to analyze fair use in an attempt to reach more consistent and sound decisions. Part I explores the state of the law as it pertains to fair use. Part II highlights the fundamental deficiencies with the current fair use analysis and introduces a new, but complementary, framework and a discussion of how triers of fact are to best use it to reach logical resolutions. Part III implements the framework in the context of previously decided cases to view how the framework either supports the Court's decision or contradicts it. Finally, the Conclusion summarizes the results. Once again, the goal of this framework is not to recreate fair use jurisprudence, but instead to provide a viable mechanism to explain a court's reasoning.

## I. BACKGROUND

### A. *Copyright Basics*

The U.S. Constitution grants the Congress the power to “promote the Progress of Science and useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Rights and Discoveries.”<sup>4</sup> Otherwise known as the Copyright Clause, this provision within Article I lays out a grant of federal power to regulate certain intellectual property rights to create a system to adequately promote science.<sup>5</sup> Rather than having to rely on its regulatory powers through the Interstate Commerce Clause, the Copyright Clause gives Congress a direct means by which to provide authors protection from unfair uses of their creative works.<sup>6</sup>

Of course, there are limitations. The Copyright Clause itself restricts copyright protection for “limited times”, which, as of works currently created, lasts for 70 years after the author's death for individuals, if the author is an individual.<sup>7</sup> Copyright protection lasts anywhere from 95-120 years for works created by a corporate entity.<sup>8</sup> Further, the Copyright Act only confers protections to authors whose works are fixed in a tangible medium of expression.<sup>9</sup> A crucial corollary to this proposition is that ideas are not

4. U.S. Const. art. I, § 8.

5. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) (stating that a key aspect of the Copyright Clause involves “rewarding authors for their creative labor”).

6. *Id.* at 212 (holding that Congress, and not the courts, is tasked with how best to implement the Copyright Clause's objectives).

7. 17 U.S.C. § 302(a) (2012).

8. 17 U.S.C. § 302(c) (2012).

9. 17 U.S.C. § 102(a) (2012).

copyrightable and can be appropriated without running afoul of copyright laws.<sup>10</sup>

Take for example the successful animated film *Cars*. *Cars* was released in 2006 and features an animated, talking red race car named Lightning McQueen.<sup>11</sup> The film centers on Lightning McQueen's quest to win the Piston Cup in the face of heavy competition from his peers.<sup>12</sup> Similarly, *Roary, the Racing Car* is a television show that began in 2007.<sup>13</sup> It features Roary, who is also an animated, talking red racecar.<sup>14</sup> Roary teaches lessons to small children through various adventures as he races on the Silver Hatch Racing Circuit.<sup>15</sup> The cars themselves are similar, but not identical, and the voices used and adventures of the cars are different.<sup>16</sup> At first blush, it might appear to the untrained eye that *Roary* has committed some sort of copyright infringement against *Cars*. However, what was taken, if anything, was the idea of using a red talking animated racecar as the centerpiece of a children's entertainment show. Nothing fixed in a medium was copied – only the idea for such a show was appropriated. Under the Copyright Act, this is legally permissible and *Cars* has no legal remedy to enjoin *Roary* from the use of this idea. This stems partly from the fact that the law seeks only to protect the specific form of the work produced and not the idea behind the work.<sup>17</sup> Otherwise, giving monopoly power to an idea would stifle innovation, limit creative outlets, and reduce the panoply of creative works available for consumers.

Originality is the fountainhead for copyright protection.<sup>18</sup> In order to be eligible for copyright protection, the work must actually be created by the author and possess some minimum level of creativity.<sup>19</sup> The Copyright Act itself provides an illustrative, not exhaustive, list of original works of authorship that have copyright protection.<sup>20</sup> As one would expect, literary works, movies, sound recordings, and paintings are considered original works of authorship.<sup>21</sup> Other works, such as dance, pantomime, architectural works, and photographs also are protected.<sup>22</sup> On the other hand, facts are

10. 17 U.S.C. § 102(b) (2012); *See also Eldred*, 537 U.S. 186 at 219 (2003).

11. *CARS* (Walt Disney Pictures 2006).

12. *Id.*

13. *See generally* ROARY, THE RACING CAR (PBS Sprout 2007).

14. *Id.*

15. *Id.*

16. *Id.*

17. 17 U.S.C. § 102(b) (2012).

18. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co, Inc.*, 499 U.S. 340, 344 (1991).

19. *Id.* at 345.

20. 17 U.S.C. § 102(a) (2012).

21. *Id.*

22. *Id.*

not copyrightable, except that a unique compilation of facts does retain some copyright protection.<sup>23</sup> For example, the statement “the sun is 93 million miles from Earth” is a non-copyrightable fact, but a compilation of terms describing animal groups, arranged based on their “lyrical and poetic potential,” does have some copyright protection.<sup>24</sup>

Prior to 1989, works that had not been formally registered received no copyright protection and infringers were immune from suits for infringement occurring prior to registration.<sup>25</sup> Now, copyright registration is no longer necessary to protect substantive rights, but it is a procedural prerequisite that must be completed before a lawsuit is filed.<sup>26</sup> In other words, copyright registration is “required for litigation but not for the existence of copyright.”<sup>27</sup>

In any copyright infringement case, there is what amounts to a three-step analysis that must be performed to resolve any dispute. First, copyright holders can, and often do, license or grant consent to third parties for the limited use of their works. The scope of the ability to use copyrighted works is dependent upon the licensing agreement.<sup>28</sup> This is an issue of contractual interpretation as to what the intent of the parties is. If the use by the third party is included in the terms of the licensing agreement, the author has contractually consented to waive his/her copyright and the author no longer has a substantive right to sue under copyright law.<sup>29</sup> Additionally, copyright holders can make their works “open source,” by explicitly waiving some or all copyrights in their otherwise protected work.<sup>30</sup> Thus, any use of these works by third parties does not constitute copyright infringement despite any actual copying, so long as the user complies with the terms of the open source license.<sup>31</sup> Websites such as Creative Commons are

23. *Feist*, 499 U.S. at 344 (1991).

24. *Lipton v. Nature Co.*, 71 F.3d 464, 467 (2nd Cir. 1995).

25. The U.S. became a signatory to the Berne Convention Implementation Act of 1988, which among other things changed copyright law to make registration permissive rather than mandatory. The Act became effective on March 1, 1989. See Pub. L. No. 100-568, 102 Stat. 2853 (1989). For further discussion, see *Society of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 44 (1st Cir. 2012).

26. See 17 U.S.C. § 408(a) (2012); 17 U.S.C. § 411(a) (2012).

27. *Neri v. Monroe*, 726 F.3d 989, 991 (7th Cir. 2013).

28. See *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998).

29. *Id.*

30. See *Open Source Definition*, OPENSOURCE, <http://www.opensource.org/osd.html> (last visited September 1, 2014).

31. This is prevalent in the software industry, where open source licenses essentially grant a royalty-free license to users that allows users to modify and/or use the software so long as certain conditions are followed. Debra Brubaker Burns, *Titans and Trolls Enter the Open-Source Arena*, 5 HASTINGS SCI. & TECH. L.J. 33, 33–34 (2013). Some of these conditions might include a requirement to provide copyright notices and/or to make the source code readily obtainable to other users. Maxim V. Tsotsorin, *Open Source Software Compliance: The Devil is Not So Black as He is Painted*, 29 SANTA CLARA COMPUTER & HIGH TECH L.J. 559, 559–60 (2013).

devoted to developing tailor-made copyright licenses that allow authors to make their works completely open source or open source with restrictions.<sup>32</sup> Internet sites such as Flickr, for example, give users the ability to declare their works to be open source for the public's use.<sup>33</sup>

In the absence of a licensing agreement, courts must then consider the next question: has the infringer appropriated anything copyrightable into his/her work?<sup>34</sup> In other words, has the infringer copied, distributed, or publicly displayed any part of a fixed, original work created by the author?<sup>35</sup> In most cases, this is easy to determine. It is beyond debate that Vanilla Ice's song "Ice Ice Baby", for example, uses the opening beat from Queen's "Under Pressure."<sup>36</sup> The two songs sound almost identical at their inceptions and only upon very close attention can someone distinguish the two.<sup>37</sup> Since musical beats and arrangements are original, creative, and fixed in a medium, Queen should have the right to prevent Vanilla Ice from appropriating any part of its work.

More recently, the well-known *A&M Records* copyright infringement case involved massive amounts of direct copying of millions of songs on the Napster peer-to-peer network.<sup>38</sup> Songs retain copyright protection even in electronic form, and there was simply no doubt that direct copying in violation of the original author's copyrights was rampant.<sup>39</sup> As a result, the Court of Appeals for the Ninth Circuit found Napster to be legally responsible for the copyright infringement occurring through its website.<sup>40</sup>

On the other hand, songs that sound vaguely familiar to, but not identical to, an original work are more difficult questions more appropriately resolved by a jury rather than on summary judgment. For example, the band Loomis and the Lust has filed suit against the pop star Jessie J for her

32. See CREATIVE COMMONS, <http://www.creativecommons.org> (last visited September 1, 2014).

33. See FLICKR.COM, <http://www.flickr.com> (last visited September 1, 2014).

34. See generally 17 U.S.C. § 102 (2012); 17 U.S.C. § 106 (2012).

35. 17 U.S.C. § 102 (2012).

36. To listen to those songs, see YOUTUBE, <http://www.youtube.com/watch?v=rog8ou-ZepE> (last visited September 1, 2014) ("Ice Ice Baby"); YOUTUBE, <http://www.youtube.com/watch?v=CnTFNsmToHg> (last visited September 1, 2014) ("Under Pressure").

37. In an early 1990s interview to MTV, Vanilla Ice defended his infringement on the ground that there is a slight bridge between the two main baselines, whereas Under Pressure is simply a replaying of the hook over and over. While technically true, this does not take away from the fact that the rest of the sound is identical. To view the interview, see *Vanilla Ice MTV Interview*, YOUTUBE (June 17, 2012), available at <https://www.youtube.com/watch?v=bid0AbLTcco> (last visited September 1, 2014).

38. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

39. *Id.* at 1017.

40. *Id.*

song “Domino.”<sup>41</sup> Loomis and the Lust’s song, “Bright Red Chords,” does sound vaguely familiar to the opening of “Domino,” but the level of similarity is nowhere near the identical baselines in “Ice Ice Baby.” The threshold question to be resolved is: has Jessie J actually copied protected work, or has she simply used a series of baseline chords (or facts) available to make a new work independent of the original? Those trained in the musical arts are far more equipped to make this determination than laypersons or attorneys, and whether or not infringement actually occurred lies in the province of expert witnesses.<sup>42</sup>

### B. Defining Fair Use

Assuming a court finds that copyrightable material was used by an infringer, the usual next step is to determine whether or not the use is a “fair use.”<sup>43</sup> Fair use is a statutorily codified defense to infringement.<sup>44</sup> Essentially, Congress has determined that not all uses of copyrighted works should be impermissible. Using a smaller amount of the work to create a new one, for example, might be a fair use that society can and should tolerate.<sup>45</sup> Or, if the infringer’s use of the original is transformed into a new work independent from the original without bad faith intent to blindly profit from the author’s work, the law is more inclined to allow such appropriations to happen.<sup>46</sup> In other words, copyrighted works should not be totally impervious to infringement when the benefits to society outweigh the un-

41. See Josh Grossberg, *Jessie J Slapped with Copyright Infringement Suit Over “Domino”*, E!ONLINE (June 28, 2012), <http://www.eonline.com/news/326779/jessie-j-slapped-with-copyright-infringement-suit-over-domino> (last visited September 1, 2014).

42. *Arnstein v. Porter*, 154 F.2d 464, 473–74 (2d Cir. 1946) (holding that expert witnesses may determine similarities and infringement, but not necessarily illicit copying or appropriating).

43. 17 U.S.C. § 107 (2012).

44. Some commentators also contend that there is an ethical component to fair use as well. See, e.g., Rebecca Pressman, *Fair Use: Law, Ethics and Librarians*, 47 JOURNAL OF LIBRARY ADMINISTRATION 89, 89 (2008), Pressman argues that fair use is more than just a legal construct that constrains the behavior of infringers and that fair use also has an ethical component which might give rise to additional rights and obligations over and above the restrictions of Section 107 of the Copyright Act. See also Michael Murray, *DIOS MIO – The KISS Principle of the Ethical Approach to Copyright and Right of Publicity Law*, 14 MINN. J. L. SCI. & TECH. 89, 89–92 (2013). Michael Murray argues that the ethical responsibilities of authors to refrain from using others copyrighted works gives rise to an extra-legal obligation he terms “DIOS MIO” (Don’t Include Other’s Stuff or Modify It Obviously).

45. See Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2569 (2009). Samuelson notes that society as a whole benefits when subsequent authors are allowed to make fair uses of copyrighted work.) See also Steve P. Calandrillo and Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349, 403–04 (2008). Calandrillo and Davison argue that in light of the fact that fair use balances the need of society to obtain creative works with the author’s right to earn revenue, an important goal of copyright law in general should be to ensure original works are delivered to a mass audience.

46. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599–600 (1994) (finding that song parody’s commercial nature did not create presumption of unfair use).



fairness to the original author.<sup>47</sup> Another explanation propounded by Pressman is that the fair use defense saves time and money by eliminating unnecessary individual negotiations for insignificant uses that are too minor to require a full-fledged licensing agreement.<sup>48</sup> Indeed, Congress has recognized that some specific and relatively insubstantial public displays of copyrighted work are, by definition, not infringing, thus eliminating the need for licensing agreements for such uses.<sup>49</sup>

Section 107 of the Copyright Act provides for a balancing test of four factors to be examined for fair use.<sup>50</sup> No one factor is determinative, but instead courts are expected to engage in a balancing test where the totality of all four factors is weighed equally.<sup>51</sup> The House of Representatives specifically envisioned a rule of reason, case-by-case analysis for all fair use and rejected strict definitions.<sup>52</sup> Presumably, this was done because original works are wildly different, and works should be considered in light of their market context, creativity, and customary uses rather than a one-size-fits-all approach.

While the statute lays out four enumerated factors to be considered, courts have widely diverging methods by which these factors are interpreted and applied. No uniform test exists for fair use, or even more problematically, how best to weigh these together. Martine Courant Rife aptly describes the fair use analysis as “a chimera, something mystical and even dangerous if you stake your scholarly life on it.”<sup>53</sup> Rife does note that while there are some boundaries that can be relied on, none of those boundaries are bright lines.<sup>54</sup> Neil Weinstock Netanel describes the situation as “hope-

47. See David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1804 (2013). Fagundes argues that some instances of copyright infringement are efficient and enhance social welfare, particularly where gaining permission to use the work is “untenable” or where the social benefits to the infringement outweigh the costs of that infringement. Fagundes’ new construct of efficient infringement is not simply a re-working of fair use; rather, his idea of efficient copyright infringement seeks to go beyond fair use to create a new subset of works that are immune from copyright infringement.

48. Pressman, *supra* note 44, at 92.

49. 17 U.S.C. § 110 (2012) (e.g. Displays of movies in a face-to-face classroom – 17 U.S.C. § 110(1) (2012); Musical, non-profit performances – 17 U.S.C § 110(3) (2012); Public displays of radio or television transmissions in small businesses and small restaurants – 17 U.S.C. § 110(5) (2012)).

50. 17 U.S.C. § 107 (2012).

51. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

52. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–50 n.31 (1984).

53. Martine Courant Rife, *The Fair Use Doctrine: History, Application, and Implications for (New Media) Writing Teachers*, 24 COMPUTERS AND COMPOSITION 154, 164 (2007).

54. *Id.* at 164.

lessly unpredictable.”<sup>55</sup> Similarly, David Nimmer describes the ability to reach consistent fair use decisions as “a fairy tale.”<sup>56</sup>

Section 107 provides for the following four fair use factors:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit education purposes;
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.<sup>57</sup>

Courts have struggled to devise uniform interpretations for each of these factors. The Supreme Court has yet to give lower courts specific instructions as to how to balance these disparate factors against each other in a manner that is consistent with the purpose of copyright laws.

### C. The Supreme Court's Fair Use Decisions

Since the passage of the Copyright Act of 1976, the Supreme Court has announced a triumvirate of decisions attempting to define the boundaries of the fair use defense. They are not always consistent with one another and do not mesh together in a clear, systematic manner. Instead, the three contrasting opinions only add to the incoherency of the fair use doctrine.

In *Sony v. Universal*, the Court held that video tape recorders (VTRs) were not liable for contributory copyright infringement when private parties used these recorders to copy broadcast television programming.<sup>58</sup> The Court, for the first meaningful time, applied the fair use factors to determine whether or not these VTRs improperly infringed on the copyright authors.<sup>59</sup> The Court's fair use analysis indicated that some factors might be elevated in the levels of importance. First, the Court took special note of the first factor – the purpose of the use.<sup>60</sup> The Court, staying true to the words of Section 107(1), discussed whether or not the use was of a commercial nature.<sup>61</sup> However, the Court gave a legal presumption to the com-

55. Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 716 (2011).

56. David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).

57. 17 U.S.C. § 107 (2012).

58. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984).

59. *Id.*

60. *Id.* at 448–49.

61. *Id.*

merciality of the use, stating that when a device is “used to make copies for a commercial or profit-making purpose, such use would be presumptively be unfair.”<sup>62</sup> The Court further found the contrary presumption would be true as well – a finding of non-commerciality gives rise to a presumption of fairness.<sup>63</sup> The statute does not mandate or even suggest such a presumption; rather, the Court viewed the commerciality of the use as one that transcends other factors.

This is particularly noteworthy when considering the short shrift the Court gives to factors two and three. While conceding that both of these factors militate in favor of an unfair use, the fact that VTR copying is at its core a noncommercial activity when done in the home not only outweighed but also rendered practically irrelevant the calculus of those two factors.<sup>64</sup> No real “weighing” occurred between these factors – one was simply deemed to be presumptively more important on the issue of fair use.

The Court then discussed the fourth factor – the effect on the copyrighted work. The Court made it clear that the fourth factor, unlike the second or the third, does matter and should be weighed against the first factor.<sup>65</sup> Specifically, the Court found that, for noncommercial uses, there may be an unfair impairment of an author’s copyrights if the use affects the potential market for the work or if the use affects future incentives to create original works.<sup>66</sup> In the end, the Court found no harmful effect in time-shifting, or simply watching a program at a different time than when it normally airs, and therefore the VTRs could successfully assert the fair use defense.<sup>67</sup>

The second case, *Harper & Row v. Nation Enterprises*,<sup>68</sup> changed the overall thrust of *Sony*. There, a magazine, *The Nation*, printed excerpts from an unpublished memoir on Gerald Ford without the permission of the copyright holder, Harper & Row.<sup>69</sup> The Court first noted that the four fair use factors are not exclusive; however, those in fact were the only four considered.<sup>70</sup> The Court backed away from the commercial/noncommercial

62. *Id.* at 449.

63. *Id.*

64. *Id.* at 449–50. As noted by the Court, television shows are likely to be of a creative nature. Further, there is no doubt that the entire copyrighted work is being copied. The Court noted this but ultimately disregarded that fact in the fair use analysis.

65. *Id.* at 450.

66. *Id.* at 450–51. The Court implied that the effect of the use is not important when the use is commercial, stating that “noncommercial uses are a different matter.” *Id.* at 451. So, the effect of the use would only be weighed when the purpose of the use was noncommercial.

67. *Id.* at 456.

68. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539–42 (1985).

69. *Id.* at 542.

70. *Id.* at 560–61.

presumption by instead holding that, “the fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use.”<sup>71</sup> Even though news reporting could be considered noncommercial, the Court still found this factor weighted against a finding of fair use because *The Nation* essentially stole these excerpts and deprived Harper & Row of the benefits of being the first to publish the memoirs.<sup>72</sup> No elevation in importance was given to the purpose as it was in *Sony*.

As for the nature, the Court found that although factual works have less protection than works of fiction, there were some “expressive” elements in the memoirs that were more creative in nature.<sup>73</sup> Further, the fact that the work was unpublished was an important aspect of its nature that weighed against a finding of fair use.<sup>74</sup> As for amount, although a relatively small amount of the entire memoir was taken and reprinted, the most important or core parts of the work were the ones actually copied. The Court noted that because the important parts of the work were taken, the amount factor tended to favor a finding of infringement.<sup>75</sup>

Lastly, the Court found a substantial effect on the market of the unpublished memoir since *The Nation* was able to get these excerpts to the public first. Importantly, the Court here announced a clear departure from the commercial presumption in *Sony* by holding, “[t]he last factor is undoubtedly the single most important element of fair use.”<sup>76</sup> The Court held that a finding of clear-cut, actual damages is not necessary; instead, an author need only to show a reasonable probability exists that the infringement leads to adverse effect before the burden shifts to the defendant to show the revenue loss would have occurred even without the infringement.<sup>77</sup>

The final of the three cases is *Campbell v. Acuff-Rose*.<sup>78</sup> In that case, the group 2 Live Crew wrote a song titled “Pretty Woman”, which they intended to be a parody version of Roy Orbison’s song “Oh, Pretty Woman”. The music and beat of both songs are very similar and there was little

71. *Id.* at 562. The language that commercialism “tends to weigh” against fair use, rather than being presumptively against fair use, is certainly a departure from *Sony*. This implies that the purpose factor is simply to be balanced against the others, since all of the factors generally tend to weigh one way or the other, whereas a presumption implies that the other factors must be of sufficient weight to overrule a finding of infringement.

72. *Id.* at 562–63.

73. *Id.* at 563–64.

74. *Id.* at 564.

75. *Id.* at 565–66.

76. *Id.* at 566.

77. *Id.*

78. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

doubt that 2 Live Crew took copyrightable material from Acuff-Rose, the copyright holder for “Oh, Pretty Woman.”<sup>79</sup> Importantly, the *Campbell* Court clearly departed from the holdings of *Sony* and *Harper & Row* that either the commerciality or the effect on the market is given special consideration. Rather, the Court stated, “Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>80</sup>

For the first time after 1976, the Supreme Court introduced the concept of the “transformative use” as a key component of the purpose of the use. Those works that take the original and transform, add to, or otherwise modify it for a “further purpose or different character” are more likely to be fair uses.<sup>81</sup> In departing from *Sony*, without expressly overruling it, the Court held that the more transformative the work is, the less commercialism is significant.<sup>82</sup> This is a far cry from *Sony*, where a finding of commercialism gave rise to a presumption of unfairness.<sup>83</sup>

The Court then applied the transformative use doctrine to 2 Live Crew’s parody of “Oh, Pretty Woman”. The Court had very little trouble finding that a parody transforms an original into a new work of humor and criticism. Continuing on, the Court found that even though this factor weighed in favor of fair use, no presumptive weight should elevate this factor over the others.<sup>84</sup>

Next, the Court noted that Orbison’s song is clearly creative and at the core of what should be protected by copyright – however, the Court noted that due to the unique nature of parody, this fact “is not much help in this case.”<sup>85</sup> Next, the Court found that the analysis used for the amount and substantiality is different when judging parodies, given that parodies by their very nature must appropriate material from the original to get the parody point across. For parodies, then, the analysis to be used is whether or not “no more than necessary was taken,” rather than looking at how much was taken in absolute terms.<sup>86</sup> For the fourth factor, the effect on the value of the original, the Court held that the record was incomplete in that no evidence was submitted on the core issue of whether or not the rap version

79. *Id.* at 574.

80. *Id.* at 578.

81. *Id.* at 580.

82. *Id.*

83. *Id.* at 580. The Court did hold, however, that where no transformative purpose exists, the “extent of its commerciality loom[s] larger.”

84. *Id.* at 583–84.

85. *Id.* at 586. However, this problem is remediated by the new framework proposed. A grade of “4” could still be assigned to the nature without effecting the court’s final determination of fair use.

86. *Id.* at 589.

would have any impact on the market for the original.<sup>87</sup> Crucially, the Court did not mention *Harper & Row*'s holding that the fourth factor is the most important, and combining that with its holding that all factors are to be explored, leads to the inevitable conclusion that *Campbell* declined to follow *Harper & Row* on that point.

#### *D. Interpretations of the Fair Use Factors*

While the Supreme Court has given general guidance as to the meaning of the four factors, other courts and commentators have attempted to fill in the missing gaps. As noted earlier, the two main components inherent within the purpose of the use is whether the use is commercial and whether the use is transformative. The commercial/nonprofit dichotomy is explicit in the text of Section 107, but there is no statutory definition for a commercial use. Granted, certain illustrative noncommercial purposes such as news reporting, teaching, scholarship, etc. appear in Section 107, but no overarching definition as to what is and what is not commercial exists in the statute.<sup>88</sup>

First, monetary gain is not a necessary prerequisite to a finding of commerciality.<sup>89</sup> Instead, what is crucial is “whether the user stands to profit from the exploitation of the copyrighted material without paying the customary price.”<sup>90</sup> Eric Gorman notes that commerciality often turns on if the infringing use was “primarily for public benefit, or for private commercial gain.”<sup>91</sup> To the contrary, nonprofit uses are more likely to be deemed fair.<sup>92</sup>

Matthew Sag devised categories of commercial and noncommercial uses as those terms are understood by parties to litigation.<sup>93</sup> He defined commercial uses as those that used the original work as “part of a commercial product or service or as an intermediate step to creating a commercial product or service.”<sup>94</sup> On the other hand, Sag categorizes noncommercial uses as uses that include are either personal, educational, research-based, or for public communication.<sup>95</sup> This categorization is helpful in that it allows

87. *Id.* at 593.

88. 17 U.S.C. § 107 (2012).

89. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

90. *Id.* Presumably, the customary price involves some sort of licensing agreement.

91. Eric D. Gorman, *Who Gets the Last Laugh? Satire, Doctrine of Fair Use, and Copywrong Infringement*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 205, 208 (2010).

92. Matthew W. Wallace, *Analyzing Fair Use Claims: A Quantitative and Paradigmatic Approach*, 9 U. MIAMI ENT. & SPORTS L. REV. 121, 134 (1992).

93. Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 56–61 (2012).

94. *Id.* at 61.

95. *Id.*

courts to pigeonhole purposes into particular categories in the fair use analysis. One problem inherent with such categorization is that some uses have multiple purposes, even if one predominates over the other.

Since *Campbell*, transformative uses are just as important, if not much more important, than whether the use is commercial. As *Campbell* noted, a work should have “new expression, meaning or message” to be considered transformative.<sup>96</sup> Sag notes that an exact definition of transformative uses is difficult, giving examples including substantial copying, recontextualization, and even nonexpressive uses that were held to be transformative uses.<sup>97</sup> So, both the motivation behind the work and the potential customer base the transformative work serves are key ingredients to determine what is transformative.

The nature of the copyrighted work revolves around the factual-fiction distinction, with greater copyright protection for creative works such as works of fiction rather than factual databases.<sup>98</sup> Essentially, the inquiry boils down to whether or not the work is creative or informational.<sup>99</sup> This is in line with the goals of copyright protection in the first place; original, creative works lie within the core of copyright protection and it is this core that should be protected to incentivize further creative works. Informational works, or works based on factual events, do not require as much creative talent. Giving monopoly power over works that are more grounded in fact prohibits others from disseminating this information in other forms.

The amount and substantiality requirement, as noted in *Harper & Row*, includes a discussion of both the absolute amount taken as well as whether or not the important portions of the work were copied.<sup>100</sup> There

96. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

97. *Sag*, *supra* note 93, at 56.

98. Brian Link, *Drawing a Line in Alternate Universes: Exploring the Inadequacies of the Current Four-Factor Fair Use Test through Chanslash*, 33 T. JEFFERSON L. REV. 139, 154 (2010). Link describes the inquiry on nature as a “factional-fictional spectrum”, suggesting that courts afford more protection to works that are more akin to fictional novels. This recognizes that not all works fit nicely into a fictional or factual category, such that some works are more factual than others.

99. *Sag*, *supra* note 93, at 61.

100. When characters from a work are taken, courts have used either the “sufficiently delineated test” or the “story being told test”. See Link, *supra* note 98, at 156–159. Link describes the sufficiently delineated test, developed first in the Second Circuit, as one where courts examine “the detail in which the previous works developed the physical and emotional characteristics, character traits, and the interrelationships of the characters.” *Id.* at 156–57. In other words, works that use characters from a previous work, such as a sequel, fairly use those characters if the original had not already fleshed out their basic personality and physical characteristics. On the other hand, the “story being told” test greatly limits which characters are copyrightable. Only those characters that are the main, leading characters that tell the story are protected under this test. See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954) (“If the character is only the chessman in the game of telling the story he is not within the area of protection afforded by copyright.”). As Link aptly observes, “Under this narrowly drawn test, very few characters would be protected outside the original work”. Link *supra* note 93, at 159.

currently exists no baseline threshold, above which leads to an inference of infringement. Instead, a determination of when too much is taken often depends on the individual work itself. For example, as discussed above, *Campbell* specifically stressed in the context of parodies that an absolute amount taken is inappropriate; instead, courts are to look at whether no more than necessary was taken for parodies.<sup>101</sup> Contrast the holding in *Campbell* with *Harper & Row*, where a mere 300 words, or 13 percent of the copyrighted article, were taken, yet this was found to militate in favor of infringement given that the important parts of the memoir were taken.<sup>102</sup>

The final factor, the potential effect on the market or value of the work, focuses on whether or not the infringing work will compete against the original. Sag summarizes the effect factor as “an inquiry into competitive injury or lost sales.”<sup>103</sup> Competitive injury could include a situation where a competitor’s overall viability is increased, not necessarily at the expense of but rather because of, an unauthorized copying of a protected work. Other possible effects include market substitution or demand suppression that adversely impacts the original author’s potential market.<sup>104</sup> In other words, does the infringing work replace the market for the original so that customers buy the infringing work instead of the original? This obviously also involves lost sale and revenues. If the infringing work competes with the original in the marketplace, customers may opt to obtain the infringing work instead of the original. This is precisely the fear encountered in *A&M Records* case in that users could potentially download music for free instead of purchasing it legally.

## II. ANALYSIS

### *A. Problems With the Current Method of Fair Use Decision-Making*

Balancing tests are notoriously difficult to apply or predict, with litigants left at the mercy of the trier of fact as to how factors are balanced. In fact, the uncertainty in how the fair use balancing test will be analyzed may drive litigation that otherwise would never occur. The very unpredictability and vagueness of fair use could lead both authors and infringers to firmly stand their ground with the belief, reasonable or not, that the balancing test will be resolved in their favor. At the other end of the spectrum, Rife notes that the Supreme Court’s inability to clearly stake out the contours of fair use creates an overly cautious fear of infringement that results in a sizable

101. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 589 (1994).

102. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 565–66 (1985).

103. *Id.* at 64.

104. Link, *supra* note 98, at 159.



reduction of legally fair uses that may be otherwise be educationally beneficial in universities.<sup>105</sup> This is far less likely to happen in situation where the rule is clear, with only room for interpretation at the margins. Potential fair users of copyrighted works might be simply unwilling to fight for their right to use works when faced with the massive potential liability if their fair use calculus is incorrect.<sup>106</sup> Thus, for many casual “infringers”, the benefit of posting a random video on YouTube is certainly not worth the risk of fighting a copyright takedown notice where the user derives no significant revenue from that use.

Courts, predictably, are all over the map when it comes to performing the balancing test. As seen above, some emphasize the first factor, others the fourth. Some gloss over or minimize the importance of one or more factors. The danger in allowing a free-for-all balancing test is the temptation to minimize those factors in favor of the adverse party and emphasize those in favor of the other.<sup>107</sup> Intentional or not, the fair use balancing test is susceptible to allowing the trier of fact to cherry pick factors in favor of the winning litigant to achieve a result-driven decision rather than a purely analytical one.<sup>108</sup> Balancing tests in particular have been targeted as unprincipled, result-driven, and bad jurisprudence.<sup>109</sup>

105. Compare *Id.* at 168 with Rife, *supra* note 51, at 170–73. Rife persuasively argues that one cause of fair use fear is a lack of education. She advocates that fair use should be taught not only in “law” classes, but in writing classes as well, going so far as to advocate that fair use should be a learning outcome in writing classes where students are asked to critically apply the four factor tests in a variety of writing-based situations to compensate for the lack of clarity in education. This, of course, begs the questions as to exactly how best to educate on fair use when currently there is no uniform understanding of how to apply these factors.

106. David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 151–53 (2009); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007).

107. See Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property and the Law*, 80 CAL. L. REV. 513, 531 (2004) (“With its emphasis on the four stated factors, fair use is an explicitly result-oriented doctrine”); Nimmer, *supra* note 56, at 281. Nimmer notes that courts make the fair use determination first, and then align the four factors to coincide with that determination. Nimmer describes the situation as one where, “the four factors fail to drive the analysis, but rather serve as convenient pegs on which to hang antecedent conclusions.”

108. Commentators see result-oriented rulings as undesirable when it appears as though the end result, and not the process by which the ruling is reached, is the driving force behind the ultimate resolution. When rulings are unprincipled or done on a seemingly ad hoc basis, this gives rise to unacceptable result-driven rulings. John E. Simonett, *The Use of the Term “Result-Oriented” to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 187 (1984). Others have gone so far as to say that result-driven jurisprudence is almost by definition unprincipled and problematic. Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627, 692 (2009). As James Gordon (2004) succinctly puts it, “‘A good result does not render the process lawful. Result-oriented jurisprudence is unprincipled and inconsistent with the rule of law’”. James D. Gordon, “*Acorns and Oaks: Implied rights of Action under the Securities Acts*,” 10 STAN. J.L. BUS. & FIN. 62, 72 (2004).

109. See Jon D. Michaels, *Symposium: Law at the Intersection of National Security, Privacy, and Technology*, 88 TEXAS L. REV. 1435, 1473, n.171 (2010); Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. 351, 354 (2006) (balancing tests are susceptible to “result-oriented malleability”); Leonard Weintraub, *Crime of the*

More innocently, it is difficult in practice to weigh factors against each other without some underlying, objective standard. If the nature of the copyrighted work is creative but the amount used small, how do you weigh those? Do those two essentially negate each other or does one of those factors matter more than the other? As it stands now, there is no real guidance from courts as to how to balance the factors in the most appropriate way.

The more difficult question concerns the intensity of the factors. Surely the relative strength or weakness of the factors must come in to play in order to balance them together correctly. Putting a stone on each of the two sides of a scale does not mean it is balanced – if one stone is larger than the other, the scale will tip in that direction in spite of the fact each scale has the same number of stones. In the fair use analysis, one factor might strongly weigh towards a finding for or against fair use, while other factors in the same case weakly support one way or the other. Undoubtedly, any balancing test needs to incorporate the concept of intensity, so that a strong factor outweighs a weak factor. But, the problem remains that no existing framework allows practitioners or courts to make these important determinations. Should a strong creative work outweigh a small amount used? How do you fix how strong or weak a nature, purpose or effect are? Or, to complicate even further, how do you weigh a strong non-infringing purpose with a weak creative infringing nature and a small, but measurable, effect on the potential market? Does one strong factor outweigh two or three weak factors? As will be seen below, there is currently a mish-mash of analyses used by courts that do not address this underlying problem, but simply plow ahead and balance these factors loosely without any real solid logical basis for the weighing.

### *B. The New Framework*

In light of this inherent problem, a new approach to fair use is needed. This article seeks to offer that new approach by designing a simple, yet complete, framework within which the factors can be appropriately balanced with significant leeway for litigants to argue for or against any particular factor. This quantitative approach to fair use still uses elements of qualitative analysis. The qualitative reasoning employed for each fair use factor is then converted to a number value. The number values assigned to each factor correlates with the relative strength each factor has for or against fair use. In other words, the number values attached to each factor

*Century: Use of the Mail Fraud Statute Against Authors*, 67 B.U. L. REV. 507, 536 (1987) (“[t]he balancing test is nothing more than a result-oriented test without any underlying principles for lower courts to use.”).

are still up for vigorous debate, but once those number values are determined, the framework provides a firm and discrete answer to the issue of fair use.

To be clear, this framework is not intended to announce a new basis for finding fair use or to replace existing interpretations of copyright law, but instead is intended to complement it. Its purpose is to reflect, rather than change, the prevailing legal views on fair use. Reforming the analytic process of fair use can help to bring uniformity to fair use decisions and bring some level of predictability into the fair use equation. The key in any well-drafted precedential judicial decision is not so much the final outcome, but rather the roadmap used to arrive at the verdict.

With that constraint in mind, we proceed to the explanation of the new approach to fair use. At bottom, a recognition that no factor is elevated in importance by Section 107 is a beginning underlying assumption in this proposal. The foundational underlying assumption inherent in this framework is the directive in *Campbell* that all factors should be considered equally and the results should be weighed together.<sup>110</sup> This might be contrary to actual practice, in that the first and fourth factors are highly correlated with the overall finding of fair use.<sup>111</sup> But, as will be seen, the framework proposed herein would not necessarily deviate from those correlations, all other things being equal.

The following chart represents how the new system is to be applied:<sup>112</sup>

<b>Fair Use Factor</b>	1 (Strong Fair use)	2 (Weak Fair use)	3 (Weak Infringement)	4 (Strong Infringement)
<b>Purpose</b>				
<b>Nature</b>				
<b>Amount</b>				
<b>Effect</b>				

Each factor is given a separate numerical grade signifying its relative strength or weakness for fair use. The lower the number assigned, the more

110. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

111. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 582–86 (2008).

112. For ease of reference, these factors hereinafter will be labeled, “purpose”, “nature”, “amount”, and “effect”.

likely fair use is a successful defense. The higher number grades represent a finding that would negate fair use. In most cases, there is not a clear-cut, definitive answer for any of these. Often, for example, an infringing use may have some elements of commercial and educational uses together. And, not all transformations of original works are equal – some are slightly transformational while others make more wholesale changes. As it stands now, courts are forced to make a murky, vague determination that the purpose, for example, weighs in favor of one side or the other without taking into account that some purposes are stronger than others.

Each of the four fair use factors receives a grade ranging from 1-4. A grade of 1 or 4 indicates a strong non-infringing or infringing finding, respectively. Alternatively, factors in which both infringing and non-infringing elements are present now have a way to be accurately described. A grade of 2 means that while the factor is predominately non-infringing, there is some aspect of the use that has an infringing character. The opposite is true for a grade of 3.

This framework introduces the concept of a continuum-based approach to fair use that recognizes that not all purposes, natures, amounts and effects are definitively infringing or non-infringing. It allows triers of fact to incorporate, for example, multiple purposes in the fair use analysis. This crucial piece is missing from much of the analysis in the jurisprudence. Quite simply, a strong infringing purpose should have more weight than a weak infringing purpose. This framework allows the trier of fact to make that qualitative judgment as to the intensity of each factor and then weigh each factor accordingly. Importantly, the framework ensures all factors are considered, rather than having the purpose of the use single-handedly control the outcome. The danger that is ever present within the current way fair use decisions are adjudged is that those factors that do not comport with the final fair use determination will either be, at best, minimized or at worst, ignored. This framework allows all factors, even those adverse to the final decision, to be fully considered.

### *C. How the Framework Works*

The new approach to fair use allows triers of fact to examine each of the four fair use factors and give grades on a continuum that represent their relative strength or weakness in the fair use context. In light of this, a grade of “1” indicates the strongest non-infringing purpose. These are situations where the works are highly transformative and with a non-commercial use. For example, a court has leeway to give a “1” grade to those highly transformative works if the transformation is so overwhelming that it trumps whether or not the purpose also has a commercial element. Thus, courts can

still emphasize and follow *Campbell* by assigning a grade of “1” for the purpose where a significant transformative use is found. Or, a grade of “1” would be assigned for the amount when the subsequent work uses the entirety of the original.<sup>113</sup>

A grade of “2” recognizes that while a use may be transformative and/or educational, it is not overwhelming. This would apply where perhaps the transformative use still retained some elements of the original, or where the commercial purpose of the use does not totally counteract the transformational nature of the new work. A grade of “2” still leans towards a finding of fair use, but distinguishes those uses that are not transformative in the extreme.

A grade of “3” indicates a weak finding of infringement. This would apply in a situation where a musician writes an educational song for children whose lyrics are all 50 states and capitals. While songs are inherently creative<sup>114</sup>, given the musical accompaniment and the arrangement of the lyrics, the states and capitals themselves are merely informational and do not require any creativity whatsoever. A grade of “3” might be appropriate for the nature of the copyrighted work where the lyrics are predominately informational but the overall beat and music of the song is creative.

Finally, a grade of “4” demonstrates a strong infringing use. In the *A&M Records* case, Napster users were engaging in massive copyright infringement to obtain copyrighted music without having to buy it through the marketplace.<sup>115</sup> Clearly, this had a palpable effect on music sales; when music can be obtained for free on the Internet, these users no longer have the incentive to legally purchase this same music that, but for the presence of the illegal peer-to-peer file sharing service, customers would otherwise buy. Such illegal downloads clearly diminish the value of the copyrighted work and reduce the total revenue authors would normally receive for use of their works. Consequently, a trier of fact could assign a grade of “4” under effect.

These grades are not and cannot always be objectively fixed. In many instances, the litigants will have to argue between one of two grades, such as whether or not the transformative use of the second work is weak or strong, thereby justifying a “1” or a “2”. This is really no different from the analysis as it stands now, but it allows the litigants to avoid having to play

113. A grade of “1” also applies for the nature and effect, where the nature of the work is very creative or where there is little to no effect on the value of the work in the potential market. To avoid duplicity, the discussion of the grades hereinafter will be limited to a few examples rather than a redundant and/or obvious discussion of how each grade could apply to each factor.

114. *Campbell*, 510 U.S. at 586; *Leadsinger, Inc. v. BMG Music Publ’g.*, 512 F.3d 522, 531 (9th Cir. 2008).

115. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017–18 (9th Cir. 2001).

a zero-sum game of arguing each factor either being in its favor or against it. Instead, a litigant may be able to accurately and more persuasively concede that, for example, the amount taken was substantial and the factor works against him, but instead the grade should only be a “3” rather than a “4”.

After assigning the grades for each row, the next step is to simply add the numerical grades.<sup>116</sup> The dividing line between infringement and fair use is 10.<sup>117</sup> Therefore, any sum that is less than 10 indicates that the fair use defense should be successful and the defendant should be allowed to continue to use the copyrighted work. A sum greater than 10 negates the fair use defense and indicates the defendant has infringed on the plaintiff’s original work. Importantly, once the analysis of each row and grade assignment has been completed, no further interpretation should occur. The numbers are what they are, so to speak, and whatever final value is elicited mandates a finding either for or against fair use. This system allows an effective balancing of the four factors and allows for the intensity of each of these factors to be taken into account.

This, of course, begs the question of how to resolve the dispute if the sum of the four factors is exactly 10. A tiebreaker method should be employed to reach a conclusion for sums of 10. It is true that a variety of different tiebreakers could be used.<sup>118</sup> However, the method that best comports with *Campbell* involves simply to make the purpose the tiebreaking factor.<sup>119</sup> There is no doubt that *Campbell* stressed the relative importance of transformative uses over other factors.<sup>120</sup> Therefore, when the final result is 10, whichever litigant “wins” the purpose analysis wins the case. In other words, for those sums that equal 10, when the purpose grade

116. So, if the trier of fact assigns a grade of “2” for purpose, “3” for nature, “2” for amount and “1” for effect, the sum would be 8.

117. 10 is simply the breakeven point. The average grade assignable for each column is 2.5. There are four different rows to be assigned, so that the average total score is 10.

118. For example, if 3 of 4 factors weigh in one direction, the tiebreaker could be given to the side with three factors. This would apply in a 3-3-3-1 or 2-2-2-4 split, with the side earning the 3s or 2s respectively winning. Or, a tiebreaker could be given to the side that has the most 1s or 4s, arguing that a side with extreme strong infringing or non-infringing uses should be given the benefit of the doubt.

119. It could be argued that factor 4, the effect, and not the purpose is more appropriately the tiebreaking factor in light of the Supreme Court’s declaration in *Harper & Row*, that the fourth factor is the most important fair use factor. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 539–42 (1985). However, in light of *Campbell*’s subtle rejection of *Harper & Row*’s reliance on the fourth factor and the elevation of the transformative purpose as the key factor, it makes more sense to give special tiebreaking privileges to the fourth factor. See *Campbell*, 510 U.S. at 583–84.

120. Specifically, transformative uses are at the “heart” of fair use’s protections and the more transformative a work is, the less other factors are significant. *Campbell*, 510 U.S. at 579. Therefore, if a finding on one factor leads to a finding that others are less significant, the first factor is of greater relative importance.

is “1” or “2”, the result is a finding of fair use. When the purpose grade is a “3” or a “4”, the result is that fair use is negated as a defense.

The tiebreaking procedure has the extra benefit of staying true to the jurisprudence while at the same time achieving the equalized balancing test. As noted by Netanel, lower courts have consistently, whether consciously or not, interpreted *Campbell* as a directive to elevate the purpose of the use as one of greater importance.<sup>121</sup> It certainly appears that the emphasis placed on the purpose may be too extreme, given the correlation between winning the purpose argument and winning the overall fair use debate. At the end of the day, *Campbell* still stressed that all factors are to be explored and weighed. The method used here allows the purpose to still have greater impact than the others, given the possibility that the outcome might be exactly ten,<sup>122</sup> while at the same time not giving the purpose such an enormous advantage so that it overshadows the other three factors.

The framework endorsed herein allows results to occur that might not be reached otherwise. Suppose a trier of fact completes the analysis and reaches a 3-4-1-1 result. The result is 9, meaning fair use should be found. But, if too much emphasis is placed on purpose, it is quite possible that the trier of fact will simply see a 2-2 split, see purpose as the important factor, and find for the plaintiff on infringement.<sup>123</sup> Or, in a case where the result is a 4-2-2-2 (a result of 10), the balancing test might be applied to reach a conclusion of fair use since 3 factors weigh in favor of fair use while only one does not. Such an analysis would not consider the relative strength and weakness of the factors. Given that the purpose is more important and is the tiebreaker, the fact the purpose is a 4 would hand a victory over to the plaintiff and negate a finding of fair use.

Certainly, other methods could be used to create similar frameworks, but other options either lack simplicity or consistency with *Campbell*. For example, a scale of 1-10, instead of 1-4 could be used, giving the trier of fact greater specificity to pinpoint the exact degree of infringement.<sup>124</sup> But, the problem dealing with such minute increments is the inability to really

121. Netanel found a substantial increase in fair use findings when the court analyzing the case found a transformative use as enunciated in *Campbell* – this was in line with the recent general trend to discuss and analyze the case using a transformative use when analyzing the purpose. See Netanel, *supra* note 55, at 740.

122. There are quite a few combinations that equal 10, such as 3-3-3-1, 4-3-2-1, 4-2-2-2, 4-4-1-1, and 3-3-2-2.

123. A similar outcome might be reached on a 1-4-4-4 split. If a trier of fact simply blindly sees a strong transformative use and relies on *Campbell* for the proposition that a transformative use should be given special consideration, the result would be a finding of fair use and thereby totally disregarding the strength of the other three factors in favor of infringement.

124. Or, a system of decimals could be used in the standard 1-4 framework, so that, for example, a 1.5 could be assigned. In reality, that is no different from the 1-10 system and suffers from the same drawback.

be able to put objective grades on subjective factors. How can one really discern the difference between a grade of 7 and 8? Such small increments are really not distinguishable when dealing with, for example, the nature of the use. On the other hand, the simpler strong/weak dichotomy is something that is easily distinguishable and intuitive. The goal herein is to make a framework that simplifies rather than complicates the trier of fact's decision.

Another possibility is to emphasize either the first or fourth factors, or both, within the confines of the framework itself. So, for example, the possible grades for purpose could be -1, 0, 5, or 6, with 1-4 for the other three factors.<sup>125</sup> This would augment the relative importance of the first factor by giving purpose a more extreme range of points that can be assigned. The justification behind such a system would be the importance placed on transformative use in the jurisprudence; however, this system suffers from the fatal flaw of not staying true to *Campbell*'s holding that the four factors should be weighed together. The purpose still has some extra prominence in that it is a tiebreaker, but giving it additional weight strays too far from the core holding of *Campbell*.

### III. APPLICATION

Applying this new analysis to already rendered decisions shows how effective the framework is. In many cases, the framework confirms the Court's decision and would have given the Court a firmer legal basis from which to render a decision. As will be seen, there are cases that quite possibly would have been decided differently had this method been utilized. In the analysis used below, it is important to note that the author may have to make some independent judgment when the facts or the court's reasoning could support two different grades.

#### A. *Hofheinz v. A&E*

In *Hofheinz v. A & E Television Networks*, the copyright holders of the film "It Conquered the World", starring Peter Graves, sued A&E and its program "Biography." "Biography" features an hour-long biographical feature on a particular celebrity.<sup>126</sup> On this particular episode, "Biography" featured Peter Graves and in doing so, aired a portion of "It Conquered the

125. The breakeven point would remain 10 in such a system. However, a finding of a noninfringing purpose would reduce the overall sum and require higher grades from the other three factors to reach 10. So, in the standard system, a score of 1-3-3-4 would be infringing, while in this system a score of (-1)-3-3-4 would equal 9 and a finding of fair use.

126. *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442, 443 (S.D.N.Y. 2001).



World,” without permission, to illustrate some of his earlier works.<sup>127</sup> In an interview with Graves aired on the program, he implies that “It Conquered the World” was not a serious film and was a part that he took to “buy the groceries.”<sup>128</sup> This episode of “Biography” was 44 minutes long and used 20 seconds of various scenes from “It Conquered the World.”<sup>129</sup> “It Conquered the World” lasts approximately 70 minutes.<sup>130</sup> Additionally, the film was no longer available through video rental, but plaintiff did rent it for special showings and film festivals.<sup>131</sup>

The District Court examined all four fair use factors and made a judgment as to how all four weighed, even including a discussion of whether or not the factors weighed “slightly” one way or the other. First, the Court found that A&E’s use of the film was transformative in that the purpose of A&E’s use was to provide details in a biography, whereas the original was intended for theatrical entertainment.<sup>132</sup> As a result, the Court found that the purpose of the use “tips in favor of A&E.”<sup>133</sup> The Court did not discuss the commerciality of the use, instead opting to rely solely on the transformative nature of the work. In light of the commercial context of the film - it was shown on a for-profit network – a grade of “2” is appropriate.

Next, the Court stated that “It Conquered the World” is certainly a creative work and thus the factor “tipped slightly” in favor of the plaintiff.<sup>134</sup> The Court justified weighing this factor only slightly towards the plaintiff because the work was out of circulation. In light of this, a grade of “3” is appropriate.

As for the amount, the Court emphasized that less than 1% of the film was used and the 20 seconds of film was cut in such a way to make it virtually impossible to follow along with the film’s plot.<sup>135</sup> The Court found that the factor “cuts in defendants’ favor.”<sup>136</sup> Since such a small and insubstantial portion of the film was used, a grade of “1” is appropriate.

127. *Id.* at 443 “It Conquered the World” was a science fiction film where Peter Graves played the role of a scientist.

128. *Id.* at 444.

129. *Id.*

130. *Id.*

131. *Id.* at 444–45.

132. *Id.* at 446. As the Court succinctly stated, “The 20 seconds of footage shown of that appearance in defendants’ biography was not shown to recreate the creative expression reposing in plaintiff’s film, it was for the transformative purpose of enabling the viewer to understand the actor’s modest beginnings in the film business.” *Id.* at 446–47.

133. *Id.* at 446–47.

134. *Id.* at 447.

135. *Id.* at 448.

136. *Id.*

Finally, the Court reasoned that because the movie was not available for mass rental, nor was the 20 second clip a substitute for the original, the airing on “Biography” did not affect the market for the film.<sup>137</sup> As a result, the Court found that this factor “favors A&E as well.”<sup>138</sup> So, given the total lack of evidence in favor of the plaintiff on this point, a “1” should be assigned for effect.

Adding all of the number values leads to a sum of 7, meaning A&E’s use of this clip was a fair use.<sup>139</sup> This confirms the ruling of the Court. Interestingly, the Court implicitly recognized the need to not only balance the factors together, but to also consider their intensity by using words such as “tips” and “slightly” when making the fair use determination. As the Court’s opinion reads, it is simply unclear as to how the Court makes the jump from the analysis of the factors to the end conclusion. The Court merely lays out the factors and then, without any further discussion, grants A&E’s motion for summary judgment without explaining how all four factors relate. This article’s proposed framework provides that missing, but crucial, analytical piece that justifies the finding of fair use.

#### *B. Associated Press v. Meltwater*

The case of *Associated Press v. Meltwater* involves a situation where the Court held the fair use defense did not apply.<sup>140</sup> The Associated Press (AP) is a news organization that produces between 1,000 and 2,000 news articles.<sup>141</sup> The AP then licenses these articles to third parties who disseminate them through various online outlets.<sup>142</sup> Defendant Meltwater is a news monitoring service with 4,000 U.S. customers.<sup>143</sup> Meltwater’s service operated as a kind of search engine where users could search for key terms in news articles.<sup>144</sup> Meltwater’s system would then copy news articles, including AP articles, and deliver the articles to their subscribers.<sup>145</sup> Although only excerpts of news articles were copied and provided to subscribers, as much as 60 percent of a given article could have been copied.<sup>146</sup> Its design was to provide a “news clipping” service that allowed users to see only the

137. *Id.* at 449.

138. *Id.*

139.  $2+3+1+1=7$ .

140. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 537 (S.D.N.Y. 2013).

141. *Id.* at 541.

142. *Id.* at 542.

143. *Id.* at 543.

144. *Id.*

145. *Id.*

146. *Id.* at 546.

pertinent part of the article rather than having to read an entire article to glean the desired parts.<sup>147</sup>

The Court proceeded to balance the four fair use factors. The Court found that Meltwater's use was not transformative. Meltwater's search engine was designed to deliver news to its subscribers, but only those excerpts that were germane to that user.<sup>148</sup> Meltwater added no commentary or insight into the AP stories, but instead copied them verbatim.<sup>149</sup> Meltwater's purpose behind providing this material to its users was the same as AP's purpose – to convey news and information to its users. Instead, the Court found that Meltwater "repackages," rather than transforms, the original work.<sup>150</sup> Given the Meltwater's use was not transformative and that Meltwater is a commercial, for-profit enterprise, a grade of "4" is assigned for the purpose.

As for the nature of the copyrighted work, the Court admitted that the news stories were both factual and published and as a result found that the factor weighed in favor of fair use.<sup>151</sup> The Court cited *Nihon v. Comline*<sup>152</sup> for the proposition that this factor is "at most neutral on the question of fair use."<sup>153</sup> This proposition runs wholly contrary to the notion of a balancing test and is certainly unsupported by Supreme Court jurisprudence. The nature of the work is just as important in the proposed framework and should be considered equally. Consequently, a grade of "1" is assigned for the nature, since there is little creativity in the AP news articles.

For the amount, the Court discussed both the qualitative and quantitative copying. Meltwater never copied the entire story, which would have defeated the purpose of Meltwater's service. Instead, it copied anywhere from 4.5 to 60 percent of any given article.<sup>154</sup> Additionally, Meltwater always took the lede of every article it copied, which the Court described as the heart of the story.<sup>155</sup> The Court found that this factor "weighs strongly against a finding of fair use".<sup>156</sup> As such, a grade of "4" is appropriate.<sup>157</sup>

147. *Id.* at 554.

148. *Id.* at 552.

149. *Id.*

150. *Id.* at 556.

151. *Id.* at 557.

152. *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 73 (2d Cir. 1999).

153. *Associated Press*, 931 F. Supp. 2d at 557.

154. *Id.* at 558.

155. *Id.* The lede is the opening sentence of any AP article and takes some journalistic creativity to write.

156. *Id.*

157. This article seeks to follow the Court's reasoning as much as possible, and here, the Court leaves little doubt that it believes the amount factor is a strong infringing factor worthy of a grade of "4". However, in light of the fact that nowhere near all of the work was copied, a grade of "3" might have been easier to justify. Additionally, while the lede is certainly creative, it is hard to say that the

Lastly, the Court found the effect factor weighed strongly against a finding of fair use. AP and Meltwater are essentially competitors, and Meltwater does not license AP's work to distribute to its users like other third party websites.<sup>158</sup> Meltwater obtained an "unfair commercial advantage" by not licensing these copyrighted work, which is how AP derives a large amount of its revenue.<sup>159</sup> So, a grade of "4" is appropriate for the effect.

Adding the grades together gives a sum of 13, meaning fair use is not available to Meltwater.<sup>160</sup> This comports with the Court's ruling, but the proposed framework allows the Court to dispense with the silly notion that one factor, the nature, is neutral at best. Credit can still be given for the informational nature of the work without having to worry that the overall calculus will be skewed in the wrong direction.

*C. Seltzer v. Green Day, Inc.*

The plaintiff, Derek Seltzer, is an artist that created a work entitled "Scream Icon" in 2003.<sup>161</sup> It is a very distinctive picture of a "screaming, contorted face."<sup>162</sup> Many copies of Scream Icon have been placed on walls in Los Angeles as graffiti or street art.<sup>163</sup> In 2008, Roger Staub, the video designer for Green Day, took a picture of a weathered copy of Scream Icon found on a brick wall.<sup>164</sup> Later, Staub used the picture of Scream Icon in a 4-minute video for one of Green Day's songs, "East Jesus Nowhere." Although it is slightly modified from its original form in the video, it remains clearly identifiable and is present in the middle of the screen in the video and stays throughout the entire video.<sup>165</sup> The video was played as a back-drop at seventy Green Day concerts in 2009.<sup>166</sup> The following copyright infringement litigation ensued.

The Court found that the purpose of the use weighed in Green Day's favor. The Court found that the use of Scream Icon in the video was transformative in that the picture was used as part of Green Day's video to illustrate notions of religious hypocrisy, whereas the original was a reflection of

opening sentence of any article is always going to be the most important part. As Meltwater's system illustrates, the important parts of the article depend on the user reading it.

158. *Id.* at 561.

159. *Id.*

160.  $4+1+4+4=13$ .

161. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1174 (9th Cir. 2013).

162. *Id.*

163. *Id.*

164. *Id.* (Green Day is a famous and successful rock band).

165. *Id.*

166. *Id.*

“youth culture.”<sup>167</sup> The Court relied on the fact that there was a new expressive content or message with Green Day’s use and that Green Day transformed its original content to one that expresses outrage towards religion.<sup>168</sup> Further, the Court found that the use of the work in the video back-drop was only “incidentally commercial,” since there was no direct profit or revenue gained from the use of the video.<sup>169</sup> This is a close call on the grade to be assigned, but since the work was not overly transformative and was still slightly commercial a grade of “2” is to be assigned.

However, it could be contended that there is little transformation in this at all – both were used as works of creative expression, and what the expressive content behind its use within or without the video is arbitrary at best. The Scream Icon is still readily identifiable throughout the video and is being used to promote some artistic expression and not for a totally different purpose, such as news reporting. Thus, the author contends that, under these facts, a grade of “3” for purpose is more appropriate.

Next, the Court left little doubt that Scream Icon was extremely creative, but mitigated this finding given that the work had already been published and widely disseminated prior to it being used by Green Day.<sup>170</sup> As a result, this factor weighed “slightly” in Seltzer’s favor and thus a grade of “3” is appropriate.<sup>171</sup>

Third, the Court found that the amount factor did not weigh against Green Day because the picture is incapable of being divisible.<sup>172</sup> Since Green Day necessarily needed to take the entire original to make its point, it took no more than was necessary. A grade of “2” is given for the amount factor, since the entirety of the work was appropriated.

This grade is very debatable. The Court seems to confuse parody and non-parody. For parody, the second work by its very nature takes some of the original in order to cast a humorous slant towards the original.<sup>173</sup> Here, Green Day was not parodying or satirizing the original, so there was no longer any need to reference back to the original. In the author’s view, a grade of “4” would be more appropriate given that the entire work was taken.

167. *Id.* at 1177.

168. *Id.* This finding presumes that there is some objective basis with which to determine what the exact expressive message is inherent in a work of art. It further presumes that the artist, and not the viewer, determines what the expressive meaning of a work of art is. Who is to say, for example, that a viewer of Scream Icon also could not have interpreted it as a diatribe against religion, just as Roger Staub apparently did?

169. *Id.* at 1178.

170. *Id.*

171. *Id.*

172. *Id.* at 1178–79.

173. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 599-600 (1994).

For the effect, the Court found that Scream Icon lost none of its market value and Green Day never used Scream Icon as part of its merchandise, albums, or promotional materials.<sup>174</sup> Thus, the Court found that the fourth factor weighed in Green Day's favor and a grade of "1" is appropriate given the total lack of evidence that this use affected the potential value of Scream Icon.<sup>175</sup>

The final grade is "8."<sup>176</sup> Once again, the proposed framework confirms the Court's finding of fair use. The Court noted that Green Day did not win on all four factors, but did emphasize that it did win on both the first and fourth factors, which are "generally viewed as the most important factors".<sup>177</sup> Once again, the factors should be balanced and *Campbell* stresses no one factor is more important than the others. Without a framework as the one proposed, however, it is very difficult to conceptualize how these factors weigh against each other and is very easy to fall into the trap of emphasizing the factors that best support the result reached. Using this framework eliminates that analytical pitfall and allows for a more reasoned approach.

On the other hand, if the author's interpretation of the amount factor were used – giving the amount a grade of "4" instead of "2", the result would be 10. In that case, the tiebreaker would be the purpose, which was found to be in favor of a finding of fair use. If both the purpose and the amount were changed to reflect the author's reasonable views, the sum would be 11 (3-3-4-1) and there would be a finding of infringement. So, it is clear that the way in which a court accepts or discards reasonable interpretations of the factors goes a long way to the ultimate determination of fair use.

#### *D. Gaylord v. U.S.*

Plaintiff Frank Gaylord, a sculptor, created a work of art called *The Column* to honor veterans of the Korean War.<sup>178</sup> The sculpture consisted of 19 life-sized stainless steel soldiers arranged in a unique formation and was part of an official government memorial for Korean War veterans.<sup>179</sup> Later, the United States Postal Service issued a stamp commemorating the Korean

174. *Seltzer*, 725 F. 3d, at 1179.

175. If anything, Green Day's use of Scream Icon might actually have a positive impact on the value of the work, since Seltzer's work is being seen by people who otherwise might not have been aware of its existence.

176.  $2+3+2+1=8$ .

177. *Id.* at 1180.

178. *Gaylord v. U.S.*, 595 F.3d 1364, 1368 (Fed. Cir. 2010).

179. *Id.*

War that featured Mr. Gaylord's sculpture.<sup>180</sup> The stamp showed the actual sculpture, including 14 of the 19 soldiers, taken during a snowstorm.<sup>181</sup> The Postal Service generated nearly 17 million dollars in sales from this stamp, 5.4 million of which came from collectors that never used the stamp for postage.<sup>182</sup> Mr. Gaylord sued the Postal Service for copyright infringement.

The lower court in the case found that the Postal Service's incorporation of *The Column* in its stamp was a fair use, but that holding was reversed on appeal.<sup>183</sup> The Court disagreed with the lower court that the purpose of the use was transformative. The lower court found that since the stamp featured subdued lighting and the added effect of the snowstorm, it added a "surreal" expression to the work that was not present in the original.<sup>184</sup> The Court noted that the stamp was not being used as part of a biographical work that would present a more transformative use; instead, the Court found that the intrinsic purpose of both *The Column* and the stamp was to "honor veterans of the Korean War."<sup>185</sup> Also, the Court found that since the Postal Service generated 17 million dollars, the stamp "clearly has a commercial purpose".<sup>186</sup> Combining these two findings, the Court found that the purpose "strongly" weighed against fair use, and consequently, a grade of "4" is assigned.

Next, the Court found that the sculpture was "expressive and creative", but since the work had been published, this factor simply weighed against fair use.<sup>187</sup> Therefore, a grade of "3" should be assigned. As for the amount factor, only 14 of the 19 statues were used in the stamp, the stamp including the focus of *The Column*. This factor weighed against fair use and thus a grade of "3" is assigned.<sup>188</sup> Although this is a closer call, a grade of "3" takes into account that not all of *The Column* was used in the stamp.

As for the effect, the Court agreed with the lower court and found that this factor weighed in favor of fair use. Even Mr. Gaylord admitted that the stamp actually increased the visibility and popularity, rather than diminished, the value of his work.<sup>189</sup> The stamp and the actual sculptures were

180. *Id.* at 1370.

181. *Id.*

182. *Id.* at 1371.

183. As this was a suit against the government, the lower court in this case was the Court of Federal Claims.

184. Gaylord, 595 F.3d at 1373.

185. *Id.* Further, the Court was not persuaded that the snowstorm had any effect on the purpose of the use, stating, "[n]ature's decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude." *Id.* at 1374.

186. *Id.* at 1374.

187. *Id.*

188. *Id.* at 1375.

189. *Id.*

not market substitutes and thus no effect on the stamp's value occurred because of the infringement.<sup>190</sup> So, with no market impact, a grade of "1" is assigned.

Therefore, the stamp's use of *The Column* has a total grade of 11, confirming the finding of infringement.<sup>191</sup> The Court held, "Weighing the factors, we conclude that the government's use of *The Column* in the stamp was not a fair use."<sup>192</sup> And, that was it. The weighing/balancing done by the Court consisted of an astounding one sentence, without any mention of how the intensity of the factors mix, nor a discussion of why a total lack of market impact does not mandate a fair use finding. Notably, had the Court adopted the lower court's finding on purpose, the result would have been different. A finding of a "1" or a "2" for purpose reduces the final score below 9, and illustrates the point of how a variance in simply one factor can change the entire balancing test.

*E. Warren Publishing v. Spurlock*<sup>193</sup>

Plaintiff James Warren published a variety of magazines devoted to movie monsters in the 1950s and 1960s.<sup>194</sup> Warren commissioned several artists to design the covers for his magazine, including Basil Gogos.<sup>195</sup> Gogos designed nearly 50 covers of the magazine, more than any other artist.<sup>196</sup> Defendant Spurlock decided in 2004 to publish a book on the life of Basil Gogos and approached Warren to inquire on a possible collaborative project; however, no deal was ever reached.<sup>197</sup> Even though negotiations fell through, Spurlock used at least 24 of Gogos' magazine covers in his book to illustrate the Gogos' life, ten of which were exact reproductions.<sup>198</sup> Warren filed suit for copyright infringement, with Spurlock arguing this was a fair use of plaintiff's work.<sup>199</sup>

For the purpose of the use, the Court found that Spurlock ultimately did transform the original. However, the Court noted that this was not clear-cut, given that Spurlock made exact reproductions of the original in

190. *Id.* To support this conclusion, the Court surmises that the fans of the stamp would not cease to take photographs of *The Column* simply because they already have a stamp with a depiction of it.

191.  $4+3+3+1=11$ .

192. *Gaylor*, 595 F.3d at 1376.

193. *Warren Publ'g. Co. v. Spurlock*, 645 F. Supp. 2d 402, 402 (E.D. Pa. 2009).

194. *Id.* at 405.

195. *Id.*

196. *Id.*

197. *Id.* at 406.

198. *Id.* For purposes of summary judgment, Spurlock conceded that Warren owned the copyrights in all of Gogos' magazine covers.

199. *Id.* at 411.



an effort to improve his commercial book.<sup>200</sup> At the end of the day, the Court rested its conclusion on the fact that the original work was used to sell movie monster magazines, while the second use was to illustrate a biographical account of the evolution of his work “in order to pay homage to his accomplishments.”<sup>201</sup> As a result, the Court found that the purpose of the use was transformative and “weigh heavily in favor of Spurlock”, despite the fact that the Court began its fair use discussion noting that there were some characteristics of the use that did not support fair use.<sup>202</sup>

This is an excellent example of where the proposed framework would be very helpful to elucidate the Court’s opinion. The Court’s statements seem contradictory. It is hard to imagine how the purpose of the use could weigh “heavily” in favor of Spurlock when the Court openly admitted that some of the evidence points in Warren’s favor. Had the Court been able to assign a grade, the litigants would have had no doubt determining the exact factual finding on purpose – as it currently stands, it is unclear at best. Given that some characteristics lean towards a finding of infringement, a grade of “2” is assigned.<sup>203</sup>

For the nature, the Court found that the original artwork is certainly creative, and this creative nature was not undermined by the fact that the magazine covers were long since out-of-print.<sup>204</sup> Here, though, the Court found that, “this factor weighs slightly in favor of Plaintiffs, but it is of limited relevance because of the prior finding that Spurlock’s work is transformative.”<sup>205</sup> This analysis is backwards – the Court balanced the factors together before the actual grade was awarded. The assigning of grades or determination of the four factors should be independently judged, given *Campbell*’s instruction that the four factors should be balanced equally. Once again, the proposed framework corrects this potential error in analysis by allowing the trier of fact to assign grades first, and then allow the framework to objectively balance the factors. Here, the appropriate grade for the nature should be a “4”, despite the Court’s declaration that the nature only weighed “slightly” in plaintiff’s favor. Otherwise, arguing that the nature weighs slightly in favor of infringement because of the finding on purpose does not allow for proper balancing. Analyzing the factors that

200. *Id.* at 418.

201. *Id.*

202. *Id.* at 422.

203. Admittedly, the Court may very well have intended a grade of “1”, but such a grade should be reserved only for those findings where all signs point to fair use.

204. *Warren Publ’g. Co.* 645 F. Supp. 2d at 423. The Court noted that, as a periodical, the magazines themselves have a limited time of demand, thus the fact that each is technically “out-of-print” is not relevant to the question for the nature of the work. *Id.*

205. *Id.*

way allows the purpose to effectively subsume and control the nature, departing from the Supreme Court's intent in *Campbell*.

For the amount, the Court was persuaded by Spurlock's argument that the magazine covers consisted of 1 to 1.5 percent of the total material in the magazine, which was a relatively miniscule amount.<sup>206</sup> Further, the heart of the work was not the covers, according to the Court, but rather the content of the magazines.<sup>207</sup> Having found that neither the qualitative nor quantitative aspect of the third factor favored infringement, the Court ruled that the third factor weighed "in favor of Spurlock."<sup>208</sup> In light of this finding, a grade of "1" should be assigned.

For the effect, the Court found that it weighed "slightly" in favor of plaintiffs, but only because there was a genuine issue of material fact raised by Warren as to the potential impact on the value of the work or future derivative works.<sup>209</sup> Warren contended that he intended on creating a coffee-table book that would detail the history of monster magazines, which would utilize some of the Gogos magazine covers.<sup>210</sup> According to plaintiff's experts, the Gogos book could be a market substitute for his future book, or, if the Gogos book performed poorly, could "poison" the market for his coffee table book.<sup>211</sup> Given the uncertainty of these factual assertions, for purposes of summary judgment, the Court found that these were possible market impacts and found that the effect factor weighed "slightly" in favor of Warren.<sup>212</sup> As a slight effect only, a grade of "3" should be assigned.

Adding the sums up leaves a grade of "10", which is of course a tie.<sup>213</sup> The tiebreaker to be used is the purpose. Since the purpose effect was de-

206. *Id.* at 424. The Court rejected Warren's argument that each of the magazine covers constituted a separate copyrightable work, meaning that Spurlock would have taken 100 percent of the work when he made exact reproductions. That argument has some force given that the magazine cover is a distinct work of art apart from the rest of the work. However, unlike in *Harper & Row*, where the excerpts taken from the unpublished memoirs were part and parcel of the entire work, the magazine covers have a unique and distinct character. *Id.* at 427. The covers were designed by artists such as Gogos and the rest of the magazine was presumably created by someone else. *Id.* at 406. Regardless, the Court does have a justifiable basis for reasoning that the amount was relatively small.

207. *Id.* at 424.

208. *Id.* Curiously, the Court did not find that this factor weighed "heavily" or "strongly", even though both aspects of the amount factor weighed substantially in Spurlock's favor.

209. *Id.* at 428.

210. *Id.* at 425.

211. *Id.* at 427.

212. *Id.* at 428. The effect was only "slightly" in favor of Warren because Warren's neglect to make this book for 22 years cast serious doubt on his intent to actually write and/or sell this book. *Id.* at 423.

213.  $2+4+1+3=10$ .

terminated to be in favor of *Spurlock*, the end result is fair use.<sup>214</sup> The framework allows for the factors to be appropriately balanced and, as the saying goes, “let the chips fall where they may”. The fair use finding was still confirmed, but using this framework allows a court to more objectively and qualitatively reach its conclusion without making vague assertions that it “weighed the factors and considering the purposes of copyright”.<sup>215</sup> Such vague platitudes allow a trier of fact to easily reach the result desired rather than allowing the process to logically flow to the conclusion. In the end, the Court’s decision is still confirmed by the framework, but it should be noted that this was an extremely close case that could have quite easily have gone the other way. If, for example, the Court had found that the magazine covers were the heart of the magazines, thus justifying at least a “2” for the amount, this would have tipped the scales in favor of infringement.

#### *F. Sony v. Universal*

Next, the alleged copyright infringement in *Sony* offers insight as to how the analysis used in that decision may have looked strikingly different using this framework. The Court clearly found that the purpose of the use was both nonprofit and noncommercial.<sup>216</sup> Specifically, the Court relied on the fact that private parties watching programming from the comfort of their own homes had no commercial use.<sup>217</sup> This case was decided before the transformative use doctrine was introduced, so the Court in *Sony* did not discuss it. However, it is hard to conceive a way in which verbatim copying of a television show in any way transforms the original. It is the exact same program, watched on the same medium (television) for the same purpose (entertainment). Given that the emphasis on the transformative use of the work, and the fact that VTR copying simply does not transform the work, a grade of “3” or “4” seems reasonable. A “3” appears more apt, since the noncommercial purpose certainly does militate against a finding of a strong infringing purpose.

As noted in *Sony* itself, the nature of the work and the amount used both tend towards a finding of infringement. Television shows are creative by their nature; on the other hand, sporting events and documentaries are not. Therefore, a grade of “3” seems appropriate to indicate a weak infringing nature. The amount, on the other hand, is all of the work. A grade of

214. The purpose was a “2”, meaning that there was a weak finding in favor of fair use. Once again, for tiebreaking purposes, a “1” or a “2” grade in purpose gives the victory to the side arguing fair use, while a grade of “3” or “4” gives the victory to the side arguing infringement.

215. *Id.* at 428.

216. *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417, 449 (1984).

217. Had the Court rendered its ruling based solely on its commercial nature and on its transformative uses, there is little doubt the purpose would have received a grade of “1”.

“4” is appropriate for the amount. Finally, the Court noted that the effect of the VTR copying has no impact on the potential market or value of these works. Thus, a grade of “1” is appropriate.

Adding all of these grades leaves a sum of 11.<sup>218</sup> Thus, using this framework and the emphasis on the transformative use, a contrary result is reached from the *Sony* Court’s decision.<sup>219</sup> Certainly, it is possible to envision a scenario where the Supreme Court, faced with the facts of *Sony* in a new case, could conceivably reverse itself on the fair use issue.<sup>220</sup>

### *G. Harper & Row v. Nation Enterprises*

The *Harper & Row* case is an even better illustration of how the framework could augment a court’s ruling. As for purpose, *The Nation* certainly did not transform the memoirs, but instead lifted them directly from Harper & Row’s copyrighted work.<sup>221</sup> *The Nation* used it for the same news reporting purpose that Harper & Row would have used it.<sup>222</sup> Also, given the reliance on the fact that *The Nation* stole these memoirs to use them, a grade of “4” seems appropriate. This comports with the Court’s overall view of the purpose.<sup>223</sup>

Secondly, the facts in the memoirs themselves were not creative, but the most the expressive elements within the work were appropriated. Also, since this was an unpublished work, its nature was one that gives rise to higher copyright protection. A grade of a weak infringing “3” seems correct, which takes into account that the memoirs are facts and not overly creative. Next, the amount of the work taken was small; however, the important parts of the work were the ones *The Nation* used. Once again, a finding of “3” is assigned that takes into account both the amount and sub-

218.  $3+3+4+1=11$ .

219. However, should the Court’s reliance on the noncommercial purpose of the use be solely considered, a grade of “1” in purpose would leave a sum of “9”, meaning that fair use would apply.

220. It is important to note, though, that the *Sony* Court relied on two independent holdings to reach its conclusion that VTRs were not liable for contributory infringement. *Id.* at 455. The Court found that licensees of television programming have likely consented to time-shifting and that this was not a case of infringement at all. *Id.* at 443–446. Given that television users are paying for the right to watch a show one time, it makes no difference at what time the user actually watches the show. Thus, the argument goes that time-shifting is not infringement at all, thus making the fair use determination ultimately irrelevant.

221. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 539 (1985).

222. *Id.* at 561.

223. Certainly, a grade of “3” could be argued in that news reporting might be a noncommercial purpose. However, the *Nation* still is a for-profit company in the business of selling magazines and the overwhelmingly non-transformative use militates towards finding a “4”.

stantiality and at the same time coincides with the Court's finding that this factor weighed against fair use.<sup>224</sup>

Finally, the effect should be given a "4". There was little doubt that Harper & Row's copyrighted work was significantly less valuable when *The Nation* "scooped" it. In fact, Time Magazine refused to pay \$12,000 for the story once the information was out.<sup>225</sup> Thus, a grade of "4" is appropriate. The sum of these grades is 14, which confirms the Court's finding of infringement.<sup>226</sup>

### CONCLUSION

A new approach to fair use is needed. Interpreting each of the four factors is difficult enough, but adding a requirement that these four distinct factors must be weighed together without any real objective basis makes it extraordinarily difficult to reach a decision that is objectively analytical. This lack of a real analytical process can easily give rise to accusations that the results drive the copyright bus. Even if such a sinister motive is not present, conceptualizing how different factors with different relative strengths balance or weigh against each other is tantamount to tilting at windmills. As seen, courts spend far more time interpreting the factors rather than balancing them.

The proposed framework provides that analytical process and allows triers of fact to make factual findings as to the relative intensity of each of the factors and balance them in an objective, non-arbitrary manner. Allowing the framework to produce the final determination allows a full and frank discussion of all four factors, including those that cut against the victorious side, rather than minimizing those that inconveniently do not favor the ultimate determination. Often, the framework will produce the same result as the current method of analysis, but does so in an easy-to-understand way that ensures the balancing takes place and all factors are considered. In other cases, the framework might actually reach an opposite conclusion, showing that the initial balancing of the four factors was either done incorrectly or incompletely.

At the end of the day, the purpose behind this new framework is to bring clarity to legal decision-making. Its purpose is not to offer a new, wholesale shift in how fair use determinations are made. Rather, this framework seems to complement current fair use analysis by providing an objective basis from which to make decisions. Appellate courts would like-

224. Once again, a "2" could realistically be argued, since such a small amount was used relative to the entire work.

225. *Harper & Row*, 471 U.S. at 567.

226.  $4+3+3+4=14$ .

ly prefer such analysis as well, as it clearly illustrates how the lower court made its decision. Litigants could then focus on particular factors from which to appeal on and could limit their fight on one or two grounds that might tip the scales in the opposite direction. All in all, using a clear, objective framework that logically produces a fair use determination benefits both courts and litigants alike.